

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File Number: EB-06-SD-052
Donald J. Payne)	
)	NAL/Acct. No.: 200732940002
San Diego, California)	
)	FRN: 0015901762

FORFEITURE ORDER

Adopted: June 11, 2007**Released: June 13, 2007**

By the Regional Director, Western Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* ("Order"), we issue a monetary forfeiture in the amount of seven hundred and fifty dollars (\$750) to Donald J. Payne ("Payne"), for willful and repeated violations of Section 301 of the Communications Act of 1934, as amended ("Act").¹ On December 28, 2006, the San Diego Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$10,000 to Payne after determining that Payne apparently willfully and repeatedly operated an unlicensed radio transmitter on 96.9 MHz in San Diego, California.² In this *Order*, we consider Payne's arguments that he was the landlord of the garage that the unlicensed station operated from, but that he did not operate the station, that he shut down the station prior to the issuance of the *NAL*, and that he is unable to pay the proposed forfeiture.

II. BACKGROUND

2. On April 3, 2006, agents from the Enforcement Bureau's San Diego Office monitored 96.9 MHz in the San Diego area and used mobile direction finding techniques to locate broadcast transmissions on 96.9 MHz emanating from Payne's residence at 1937 33rd Street, San Diego, California. The agents noted that the source of the radio signal was an antenna atop a mast attached to a garage on the property. The San Diego agents determined that the signal being broadcast exceeded the limits for operation under Part 15 of the Commission's Rules ("Rules") and therefore required a license.³ According to FCC records, neither Payne, nor any other person or entity, holds an authorization to broadcast on that frequency from that location.

3. On April 13, 2006, the San Diego Office sent Payne a detailed Notice of Unlicensed Operation ("*Notice*"), which gave Payne an opportunity to reply.⁴ The *Notice* stated that the unlicensed

¹ 47 U.S.C. § 301.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200732940002 (Enf. Bur., Western Region, San Diego Office, released December 28, 2006).

³ Section 15.239 of the Rules provides that non-licensed broadcasting in the 88-108 MHz band is permitted only if the field strength of the transmission does not exceed 250 µV/m at three meters. The measurements made on April 3, 2006, indicated that the signal was 7,778 times greater than the maximum permissible level for a non-licensed Part 15 transmitter.

⁴ The San Diego Office received from the U.S. Postal Service the returned certified copy of the Notice of Unlicensed Operation indicating it had been refused. The regular mail copy of the Notice of Unlicensed Operation was not returned.

operation of the radio station must be discontinued immediately, that operation of radio transmitting equipment without a valid radio station authorization constituted a violation of Section 301 of the Act,⁵ and that failure to stop the operation could result in various penalties, including forfeiture of the equipment. Two copies of the *Notice* were mailed to Payne. One was mailed via certified mail and other via regular mail. No reply was received.

4. On April 19, 2006, the agents used mobile direction finding techniques to locate broadcast transmissions on 96.9 MHz emanating from Payne's residence. The agents again took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 and therefore required a license.⁶ The agents found only one electric meter on the property of 1937 33rd Street, San Diego, California.

5. On June 13, 2006, San Diego agents approached Payne in his front yard and interviewed him about the antenna mast on his garage and the unlicensed radio station broadcasting from his property. Payne told the agents that he had nothing to do with the station. Payne indicated to the agents that he was leasing his garage to "FRSD" for \$100 per month. Payne also said he did not have access to his garage as the tenants had installed a lock on it. Before leaving the area the agents took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 of the Rules and therefore required a license.⁷

6. On October 17, 2006, the agents used mobile direction finding techniques to locate broadcast transmissions on 96.9 MHz emanating from Payne's residence. The agents again took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 and therefore required a license.⁸

7. On November 13, 2006, the agents used mobile direction finding techniques to locate broadcast transmissions on 96.9 MHz emanating from Payne's residence. The agents again took field strength measurements and determined that the signals being broadcast exceeded the limits for operation under Part 15 and therefore required a license.⁹ When agents attempted to inspect the radio station, no one would answer the door, although vehicles were parked in the residence's driveway. The agents left copies of the April 13, 2006 *Notice* at the residence.

8. On December 28, 2006, the San Diego Office issued a *NAL* in the amount of \$10,000 to Payne. Payne filed a response to the *NAL* on January 26, 2007 ("*Response*"). In his *Response*, Payne argues he was the landlord of the garage that unlicensed station operated from, but that he did not operate the station, that he shut down the station prior to the issuance of the *NAL*, and that he is unable to pay the proposed forfeiture. Finally, if a forfeiture is imposed, Payne asks for a personal interview and/or a hearing with a Commission official at the nearest field office to discuss the *NAL*.

⁵ 47 U.S.C. § 301.

⁶ The measurements made on April 19, 2006, indicated that the signal was 12,395 times greater than the maximum permissible level for non-licensed Part 15 transmitters.

⁷ The measurements made on June 13, 2006, indicated that the signal was 7,661 times greater than the maximum permissible level for a non-licensed Part 15 transmitter.

⁸ The measurements made on October 17, 2006, indicated that the signal was 8,930 times greater than the maximum permissible level for non-licensed Part 15 transmitters.

⁹ The measurements made on November 13, 2006, indicated that the signal was 6,734 times greater than the maximum permissible level for non-licensed Part 15 transmitters.

III. DISCUSSION

9. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,¹⁰ Section 1.80 of the Rules,¹¹ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), recon. denied, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*"). In examining Payne's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.¹²

10. Section 301 of the Act requires that no person shall use or operate any apparatus for the transmission of energy of communications or signals by radio within the United States except under and in accordance with the Act and with a license. Section 3(33) of the Act defines "communications by radio" as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding, and delivery of communications) incidental to such transmission."¹³ On April 3, 2006, April 19, 2006, June 13, 2006, October 17, 2006, and November 13, 2006, Payne provided services and facilities incidental to the transmission of communications by radio occurring on 96.9 MHz in San Diego, California.

11. In his *Response*, Payne argues that he was not the owner or the operator of the unlicensed station that was broadcasting out of his garage. Payne maintains that he was merely the landlord who received \$100 per month from the operators of the unlicensed station. Payne also maintains that he had no access to the equipment used by the operators of the station. As the San Diego Office determined in the *NAL*, Payne provided the garage and real property on which the operation took place, and provided the electric current used to power the radio station. Payne substantiates these findings by providing as part of his *Response* the lease that he entered into with the operators of the station, and the statement in his *Response* that in "early December 2006, he used the residence's circuit breaker to turn off the power to the garage and informed his tenants that he would not permit further operation of any radio broadcasting from his rental property." Consequently, we find that Payne participated in the operation of the unlicensed station.¹⁴ Additionally, we have previously held that because Section 301 of the Act provides that "no person shall use or operate"¹⁵ radio transmission equipment, liability for unlicensed operation may be assigned to any individual participating in the operation of the unlicensed station, regardless of who else may be responsible for the operation.¹⁶ Taken together, we find that Payne's actions amounted to willful and repeated violations of Section 301 of the Act.

12. As indicated above, Payne also argues that he shut down the station in early December 2006, prior to the issuance of the *NAL*. Payne acknowledges, however, that he did receive the April 13, 2006, *Notice* from the San Diego Office, as well as the visit from the San Diego agents in June 2006, and further acknowledges that he shut down the station in December 2006 "to comply with the FCC's demands and warnings." We find that the San Diego Office gave Payne at least two opportunities, in

¹⁰ 47 U.S.C. § 503(b).

¹¹ 47 C.F.R. § 1.80.

¹² 47 U.S.C. § 503(b)(2)(E).

¹³ 47 U.S.C. § 153(33).

¹⁴ Section 3(35) of the Act defines "radio station" as a "station equipped to engage in radio communication or radio transmission of energy." 47 U.S.C. § 153(35).

¹⁵ 47 U.S.C. § 301.

¹⁶ *Jean L. Senatus*, 20 FCC Rcd 14418 (EB 2005).

April 2006 and June 2006, to immediately shut down the illegal station operating on his property rather than face administrative sanctions. The fact that Payne finally did shut down the station eight months after the initial *Notice* shows that he did have control over the station and could have complied with the San Diego Office's warnings much earlier. Additionally, the Commission expects violators to implement corrective action to bring past violations into compliance, and that, therefore, such actions do not nullify or mitigate past violations.¹⁷ Therefore, we find no merit to this argument.

13. Further, Payne asks that the proposed forfeiture amount be reduced or cancelled because he is unable to pay the forfeiture amount. He also supplies three years of tax records to support his claim that he is unable to pay the proposed forfeiture amount. Having reviewed Payne's response along with the supporting financial documentation we conclude, consistent with precedent, that a reduction of the proposed forfeiture to \$750 is appropriate.¹⁸

14. Finally, Payne states that if a forfeiture is assessed against him, he asks for an interview or hearing with a Commission official at the nearest field office. Nothing in the Act requires the Commission to provide an unlicensed operator the opportunity for a hearing prior to imposition of a forfeiture.¹⁹ Rather, under Section 503(b)(4) of the Act, the Commission must issue a written notice of apparent liability which specifies each provision of the Act and the rules alleged to be violated, the facts upon which the charge against the named violator is based, and the date upon which the alleged violation occurred.²⁰ The *NAL* issued by the San Diego Office fully complied with these requirements.

15. We have examined Payne's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. As a result of our review, we conclude that Payne willfully and repeatedly violated Section 301 of the Act. Considering the entire record and the factors listed above, we find that reduction of the proposed forfeiture is warranted, given Payne's demonstrated inability to pay. Accordingly, the forfeiture amount is reduced from ten thousand dollars (\$10,000) to seven hundred and fifty dollars (\$750).

IV. ORDERING CLAUSES

16. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"), and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules, Donald J. Payne **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$750 for willfully and repeatedly violating Section 301 of the Act.²¹

17. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²² Payment of the forfeiture must be made by check or similar instrument, payable to the order of the

¹⁷ See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21875-76 (2002).

¹⁸ See, e.g., *Ronald E. Sauer*, 19 FCC Rcd 14884 (EB 2004); *Kornwell Chan*, 16 FCC Rcd 14893 (EB 2001).

¹⁹ *Octavio Sarmiento, Jr.* 17 FCC Rcd 25277, 25279 (EB 2002). Section 504(a) of the Act provides that any suit brought by the United States in federal district court for the collection of a forfeiture imposed pursuant to the Act shall be a trial *de novo*. 47 U.S.C. § 504(a).

²⁰ 47 U.S.C. § 503(b)(4). See also Section 1.80(f) of the Rules, 47 C.F.R. § 1.80(f); and Section 1.80(g) of the Rules, which states that procedures for hearings "will ordinarily be followed only when a hearing is being held for some reason other than the assessment of a forfeiture" 47 C.F.R. § 1.80(g). See *Arcom Communications*, 20 FCC Rcd 20061 (EB 2005), *affirmed* DA 06-1536, 2006 WL 2310791 (rel. August 9, 2006).

²¹ 47 U.S.C. §§ 301, 503(b), 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

²² 47 U.S.C. § 504(a).

Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911- 6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, Room 1A625, 445 12th Street, S.W., Washington, D.C. 20554.²³

18. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Donald J. Payne at his address of record, and Jeremy D. Warren, his counsel of record.

FEDERAL COMMUNICATIONS COMMISSION

Rebecca L. Dorch
Regional Director, Western Region
Enforcement Bureau

²³ See 47 C.F.R. § 1.1914.